

## HUMAN SERVICES BOARD

# INTRODUCTION

## DISCUSSION

Unlike her daughter in Fair Hearing No. 21,264, the petitioner in this matter is not represented by counsel. The Department's decision regarding substantiation of abuse by this petitioner arose at roughly the same time, and was based on many of the same incidents and circumstances, as those that led the Department to substantiate abuse against the

petitioner's daughter in Fair Hearing No. 21,264; and this petitioner's request for fair hearing was filed at roughly the same time as that of her daughter. Due mainly to the fact that the petitioner in this matter was *pro se*, the hearing officer continued this case over the Department's objection until the appeal in Fair Hearing No. 21,264 was concluded.

The Department did not appeal the Board's decision in Fair Hearing No. 21,264. Nonetheless, it persists in its substantiation of abuse by this petitioner. Following the Board's decision in Fair Hearing No. 21,264, the hearing officer directed the Department to file a written offer of proof in this matter. On August 28, 2008 the Department filed the following **Offer of Proof**:

1. On October 30, 2006, the Department received a report that [petitioner] was refusing to allow services into her home for MW, her grandson.

2. The APS investigator spoke to [petitioner's daughter] and [petitioner] several school staff members at MW's school, MW's attorney and MW's case manager.

3. The investigator, Larissa Dodge, spoke with [petitioner] on May 14, 2007. Ms. Dodge asked [petitioner] why there were no services for MW in her

home. [Petitioner] replied that she did not want strangers in her home, that she had to be able to sleep because she has to work at 3 p.m., and that there was no need for services because she and her daughter were meeting MW's needs themselves. [Petitioner] told Ms. Dodge that she would rather have MW get services somewhere else, even if it meant MW being removed from her home. [Petitioner] told Ms. Dodge that there was no point in adding services for MW because he could not be taught anything. [Petitioner] told Ms. Dodge that MW would never be able to get a job and that what he was learning that needed reinforcement at home wasn't real.

4. There still were no services for MW in his home when Ms. Dodge interviewed [petitioner] in May 2007.

5. Linda Smith, MW's co-guardian for medical care and his teacher, made attempts at putting services in the home through May, 2007. Her letters and reports regarding these services are attached.

6. On October 5, 2006, in a letter to Judge Howe, Ms. Smith wrote in the fourth paragraph that "there was an agreement that the Community Access Program would be assisting M in his life," and she requested his help.

7. On October 15, Ms. Smith wrote to [petitioner] about MW's needs. In the second paragraph, she wrote, "The other things we talked about were having the case manager, Natalie Brewster, work with you for some services for M from the Community Access Program. I believe that she left you a message on your machine and is waiting for a call back. I told you that I would try to call your mom and talk to her, but have not been successful in reaching her. I will be sending her a letter also."

8. Ms. Smith wrote to MW's attorney, John Thrasher, on October 31, 2006. She wrote at the end of the letter, "I would also like to see M connected to the Community Access Program, an agency that works with adults with disabilities that provide numerous services. So far, there has been little effort on the part of [petitioner's daughter] to connect M to this agency."

9. On March 21, 2007, Ms. Smith wrote another letter to Atty. Thrasher. In point 3, she states, "Natalie Brewster, Community Access Program Case Manager and I went to M's home to discuss how a program could be supported there, but there was no resolution. [Petitioner], M's grandmother, stated that the pipes in

the home freeze regularly and that they are rusted, so it would be difficult for M to shower there. We met again this past week during M's IEP. The issue of M's continued growth and learning was again discussed and how that would be addressed at home. [Petitioner] continues to state that she does not want people in her home.

10. Larissa Dodge found that M was eligible for 20 hours a week of personal care services. Although personal care is intended to be provided in the home, because M was coming to school filthy and because the school had been providing the services for years, his personal care was provided at the school, including meals, bathing, dressing, toileting.

11. Natalie Brewster, M's case manager, determined that M was eligible for respite, personal care, and flexible funding. All that M received during this time period was case management; the family refused the other services available to M.

ORDER

The Department's decision substantiating abuse and neglect is reversed.

REASONS

The Commissioner of the Department of Disabilities, Aging and Independent Living (DAIL) is required by statute to investigate allegations of abuse, neglect and exploitation of vulnerable adults, and to keep those records that are "substantiated" in a registry under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911(b). If a report has been substantiated, the person who has been found to have committed abuse may apply to the Human Services Board for relief that the report is not substantiated. 33 V.S.A. § 6906(d).

The statute identified by the Department in its respective substantiations of "abuse" and "neglect", 33 V.S.A. § 6902, provides as follows in pertinent part:

(1) "Abuse" means:

(A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

\* \* \*

(7) "Neglect" means purposeful or reckless failure or omission by a caregiver to:

(A)(i) provide care or arrange for goods or services necessary to maintain the health or safety of a vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, unless the caregiver is acting pursuant to the wishes of the vulnerable adult or his or her representative. . .

As was the case in Fair Hearing No. 21,264, there is no proffered evidence in this matter that the petitioner ever caused any physical or medical harm to M.W. Nor is there any proffered evidence that M.W. was ever in any jeopardy of such harm occurring. At best (or worst, depending on one's point of view), there may be evidence that this petitioner, like her daughter, has at times been unable to fully understand and appreciate the level of care that professionals in the field might expect. Such lack of understanding, however, hardly rises to the level of abuse or neglect as contemplated in the above statute.

Moreover, based on the testimony in Fair Hearing No. 21,264, it would appear that this petitioner at all times was acting in accord with the consent and wishes of her daughter, who was, and apparently still is, M.W.'s legal guardian. Thus, this petitioner, who it is not alleged had any legal or actual responsibility for M.W.'s care, cannot be found to have neglected M.W. within the meaning of § 6902(7), *supra*.

Moreover, as the Board noted in Fair Hearing No. 21,264, even if it could be concluded that this petitioner's actions met the above definition of either abuse or neglect, all of the petitioner's representatives and caregivers, who clearly "allowed" M.W. to remain in the petitioner's care during this entire time, would be subject to the same conclusion. Again, there is no indication that the Department has investigated any of them (or the probate judge, or its own investigator) for what clearly amounts to their ongoing complicity in M.W.'s situation. As the Board previously noted, if the petitioner is deemed to have "abused" or "neglected" M.W. during this period, what is one to make of all the others, *including the Department itself*, who were fully aware of what was happening and failed to intervene in M.W.'s behalf? If there is a distinction in the above statutes between the responsibilities of the petitioner and those of his other "caregivers"<sup>1</sup> toward M.W., the Department has *still* not indicated what that might be.

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<sup>1</sup> See 33 V.S.A. § 6902(2).